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No. 79-2044

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NATIONAL COALITION FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, *ET AL.*,
Appellants,

v.

SHIRLEY M. HUFSTEDLER, SECRETARY OF THE UNITED STATES DEPARTMENT OF EDUCATION, *ET AL.*,
Appellees,

AND

JAMES BOVIS, *ET AL.*,
Intervenor-Appellees,

AND

MR. AND MRS. PHILIP FENSTER, *ET AL.*,
Intervenor-Appellees.

On Appeal From A Three-Judge United States District Court For The Southern District Of New York

MOTION TO AFFIRM

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STATUTE:

Title I, Elementary and Secondary Education Act of 1965, 20 U.S.C. § 2701, *et seq.* 3-6

OTHER AUTHORITY:

S. Rep. No. 146, 89th Cong., 1st Sess. (1965) 4, 5

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MOTION TO AFFIRM

Pursuant to Rule 16 of the Rules of this Court, intervenor-appellees move to affirm the judgment of the district court on the ground that the district court faithfully adhered to and applied the constitutional principles set forth in this Court's decisions on the Establishment Clause issues presented by this appeal, thus rendering the question presented so unsubstantial that plenary review by this Court is unnecessary.

QUESTION PRESENTED

Whether, on the basis of the facts in the record of this case, a program established by the New York City Board of Education under Title I of the Elementary and Secondary Education Act of 1965 to provide remedial educational services by public school teachers to educationally and economically deprived nonpublic school students on the premises of nonpublic schools during regular school hours contravenes the Establishment Clause of the First Amendment.

STATEMENT OF THE CASE

A. The Proceedings Below

Appellants, a group of organizations and individual federal taxpayers, challenge the constitutionality of Title I of the Elementary and Secondary Education Act of 1965 ("Title I") to the extent that Title I permits publicly employed teachers paid with federal funds to provide remedial educational services to eligible nonpublic school students on the premises of nonpublic schools during regular school hours. The appellants filed their complaint seeking declaratory and injunctive relief on February 25, 1976.

The defendants named in the complaint were the federal officials responsible for administering Title I and the Chancellor of the New York City Board of Education, which has a program for providing Title I services to nonpublic school students of the type the appellants object to. The district court granted motions to intervene filed by two groups of parents of nonpublic school students who were receiving Title I services under the New York City Board of Education's program.

The district court, after denying the appellants' motions for summary judgment and for a preliminary injunction, set the case for an evidentiary hearing. The appellants elicited testimony from an official of the then Department of Health, Education and Welfare predicated almost entirely on hypothetical questions. The appellees presented the testimony of seven witnesses, all of whom were employees of the New York City Board of Education and were either Title I teachers or administrators of the Title I program for nonpublic school students. The appellees also offered, without objection, the affidavits of 58 persons involved in one way or another with the nonpublic school Title I program and a number of documentary exhibits relating to the administration of that program.

After receiving briefs and hearing oral argument, the court below issued its decision on April 18, 1980, ruling unanimously that the New York City Board of Education's Title I program for nonpublic school students did not contravene the Establishment Clause. The district court entered judgment for the defendants on April 30, 1980, and the appellants filed their notice of appeal with the district court on May 27, 1980.

B. The Challenged Aid Program

1. Overview of Title I

Congress enacted Title I in 1965 to provide federal funding for remedial educational programs that are administered by local public educational agencies ("LEA") for the benefit of educationally disadvantaged children living in low-income areas. See 20 U.S.C. § 2701, *et seq.* Congress acted after finding that "there is a close relationship between conditions of poverty and lack of

educational development and poor academic performance." S. Rep. No. 146, 89th Cong., 1st Sess. 5 (1965). The stated purpose of Title I is to make federal funds available "to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means . . . which contribute particularly to meeting the special educational needs of educationally deprived children." 20 U.S.C. §2701.

Title I programs are administered solely by the LEA — typically a public board of education — and are staffed entirely by employees of the LEA. 20 U.S.C. §2734(m); 45 C.F.R. §§116.42; 116a.23(f). To be eligible for federal Title I funds, a program must satisfy certain statutory criteria. For example, Title I funds may be used to provide remedial educational services only to children who meet the dual eligibility criteria of educational deprivation and residence in an area designated by the LEA, in accordance with Title I regulations, as having a high concentration of children from low-income families. 20 U.S.C. §§2722, 2732-34. Federal financing is available only for programs that supplement, and do not supplant, non-federally funded programs and that would not have been available in the absence of Title I funds. 20 U.S.C. §§2734 (f), 2736(c).

Congress did not restrict participation in Title I programs to children enrolled in public schools. The Act specifically provides:

> "To the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency shall make provision for including special educational services and arrangements . . . in which

> such children can participate. . . . Expenditures for educational services and arrangements pursuant to this section for educationally deprived children in private schools shall be *equal* . . . to expenditures for children enrolled in the public schools of the local educational agency." 20 U.S.C. § 2740(a) (emphasis added).

Title I regulations, in implementing the statutory mandate that nonpublic school students be included in the LEA's Title I program, provide that such students must be given "genuine opportunities to participate" and that the type of services provided such students shall be determined "on a basis comparable to that used in providing for the participation of public school students." 45 C.F.R. § 116a.23. Thus, as this Court has expressly acknowledged, "the legislative aim of Title I was to provide needed assistance to educationally deprived *children* rather than to specific schools." *Wheeler* v. *Barrera,* 417 U.S. 402, 406 (1975) (emphasis in original).

In considering the options available for providing Title I remedial services to nonpublic school students, Congress recognized that one option would be to provide the services on the premises of nonpublic schools. See S. Rep. No. 146, *supra,* at 12; 111 Cong. Rec. 4747-48 (1965) (remarks of Congressmen Goodell, Carey and Perkins). This Court has acknowledged that such an option is available to the LEA. *Wheeler* v. *Barrera, supra,* 417 U.S. at 422.

Anticipating that nonpublic school students might receive Title I remedial services on the premises of the schools they attend, Title I regulations restrict that form of services to assure the program remains secular in content and setting. Public school teachers may provide remedial instruction on nonpublic school premises only

to the extent necessary to assure that such services will be available to those educationally deprived students for whom Title I was designed. 45 C.F.R. §116a.23(f). Those services may be provided to eligible students only if they are not otherwise provided by the nonpublic schools. *Id.* Title I funds may not be used to pay the salaries of nonpublic school teachers for work performed during regular school hours. *Id.* The LEA must maintain exclusive direction and control over all Title I services and funds; no Title I funds can be disbursed to nonpublic schools. 45 C.F.R. §116.42. If any equipment or materials are used in connection with a Title I program on nonpublic school premises, the LEA must maintain title to and physical control over the property. *Id.*

Title I is the largest single federally funded education program in the United States. During the 1979-1980 school year, approximately $2.6 billion was allocated for Title I services nationwide. Of that amount, about four percent, or $105 million, was spent on services for nonpublic school students. Of the approximately 5 million students who received Title I services in the 1979-1980 school year, some 200,000 were enrolled in nonpublic schools. J.S., p. 13a.[1]

2. New York City's Title I Program

The New York City Board of Education ("Board") administers the largest program of Title I remedial educational services in the United States. During the 1978-1979 school year,[2] 404,686 public and nonpublic

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[1] Citations to "J.S." in this Motion refer to the Jurisdictional Statement filed by the appellants.

[2] Because the district court conducted the evidentiary hearing in this case on May 10, 1979, the evidence presented concerning New York City's Title I program related principally to how that program operated up to the 1978-1979 school year.

school students were eligible for Title I services, and New York City received approximately $146.8 million in Title I funds. J.S., pp. 13a-14a. Of the eligible students, 33,285, or 8.2 percent, were enrolled in nonpublic schools. J.S., p. 14a. Of the total Title I funds received by New York City, some $12 million, or 8.2 percent of the total, was allocated to the nonpublic school Title I program.[3] Budget limitations made it possible for the Board to provide Title I remedial services to only 13,265 of the 33,285 eligible nonpublic school students. J.S., p. 14a. Those students actually receiving services attended 213 of the 993 nonpublic schools in New York City.[4]

Consistent with the statutory and regulatory scheme of Title I, no public funds are disbursed to nonpublic schools under the New York City program.[5] Rather, the Board itself, using its own employees and its own equipment, provides remedial instructional services directly to nonpublic school students who satisfy Title I eligibility criteria of economic and educational disadvantage. Those services are remedial reading, reading skills instruction, remedial mathematics, English as a second language, and clinical and guidance services.[6] J.S., p. 16a.

The Board provides those remedial services to nonpublic school students by sending its own employees to

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[3] Def. Exh. T, ¶ 43. Exhibit T summarizes the evidence offered by the defendants through documents and affidavits. It was offered and received in evidence pursuant to an agreement among all parties.

[4] Def. Exh. T, ¶ 29.

[5] Def. Exh. T, ¶ 47.

[6] Title I clinical and guidance services are available only to nonpublic school students actually enrolled in Title I instructional programs and are designed to enhance student achievement in those programs. Def. Exh. T, ¶ 50.

the nonpublic schools during regular school hours. The Board decided on that method of providing Title I services to nonpublic school students only after experimenting unsuccessfully with after-hours and off-premises programs. When it decided to provide Title I services on the premises of nonpublic schools during regular school hours, the Board adopted policies and guidelines to assure the secular integrity of the program. J.S., pp. 14a-16a.

Title I remedial instruction is provided to nonpublic school students only by teachers and support staff who are employed by the Board and are subject to supervision and control solely by Board employees. Nonpublic school officials have no voice in the assignments of Title I teachers and professionals to particular nonpublic schools, and there is no known instance of a nonpublic school official or Title I teacher seeking a reassignment on religious grounds. J.S., pp. 16a-17a. The Board makes no inquiry into a Title I teacher's religious affiliation or beliefs, and these factors, thus, have no bearing on the nonpublic schools to which a teacher will be assigned. J.S., p. 17a. While the Board maintains no record of the religious affiliations of its Title I employees, the court below found on the basis of the evidence presented that most of the Title I teachers "work in parochial schools with religious affiliations different from their own." *Id.* The vast majority of Title I teachers are itinerant and spend less than five days a week in the same nonpublic school. *Id.*

Board employees assigned to the nonpublic school Title I program are given detailed written and oral instructions that delineate their responsibilities and restrict their activities. For example, they are told they are independent public school employees who provide

remedial services only to nonpublic school students who meet Title I eligibility requirements. They are also told that they are ultimately responsible for determining which nonpublic school students will receive Title I remedial services. They are instructed that they are not to engage in team teaching or cooperative instructional activities with nonpublic school teachers. In addition, Board employees working in the Title I program are told not to introduce any religious topics into their remedial instruction and not to become involved in any of the religious aspects of the nonpublic schools. J.S., p. 17a.

Responsibility for assuring compliance with those instructions and restrictions rests with Board employees who supervise Title I teachers assigned to nonpublic schools. J.S., pp. 17a-18a. The supervisors carry out that responsibility by making periodic, unannounced visits to Title I classrooms in the nonpublic schools.[7] During those visits, the Title I supervisors do not involve themselves in any way with the instructional or other activities of the nonpublic schools; their concern is solely with the instruction occurring in the Title I classroom. J.S., pp. 43a-44a. Conversely, Title I teachers are not subject to any supervision or control by any official or employee of the nonpublic schools.[8]

Title I remedial instruction is provided in the nonpublic schools in classrooms specifically set aside for such instruction. Those classrooms contain no religious symbols, pictures or statues. J.S., p. 18a. Typically, a Title I classroom has a hand-lettered sign on the door identifying it as a facility reserved for Title I remedial instruction.[9] The court below found that those facilities

[7] Def. Exh. T, ¶¶ 67-70.

[8] Def. Exh. T, ¶ 71.

[9] Def. Exh. T, ¶ 88.

were comparable to the facilities that this Court ruled in *Wolman* v. *Walter*, 433 U.S. 229 (1977), were appropriate for providing publicly funded remedial instruction to nonpublic school students. J.S., pp. 42a-43a.

The court below found that the vast majority of nonpublic school students who receive Title I services attend schools that are affiliated with one of several religious denominations. Approximately 87 percent of those students attend Roman Catholic schools and an additional 9 percent attend Hebrew Day schools. J.S., p. 16a. However, the court below also found, on the basis of uncontroverted evidence, that the "Catholic and Hebrew Day schools where Title I services are provided . . . do not have the characteristics of the pervasively sectarian schools described by the Supreme Court." J.S., p. 31a.

C. The District Court's Opinion

The district court resolved appellants' constitutional challenge to Title I by applying the controlling three-part Establishment Clause test of purpose, primary effect and excessive entanglement. J.S., p. 19a. Two themes underlie the district court's application of that test. First, it grounded its ruling on the uncontroverted evidence presented to it about New York City's Title I program for nonpublic school students, a program that had been in effect for 14 years at the time of its ruling.[10]

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[10] In *Wheeler* v. *Barrera*, *supra*, this Court expressly ruled that it would be "wholly inappropriate" to pass on the constitutionality of a program of Title I services provided to nonpublic school students on the premises of their schools during regular school hours "when no specific plan is before us." 417 U.S. at 426. With that ruling in mind and because the Chancellor of the New York Board of Education was a named defendant, the defendants' evidence consisted almost entirely of facts relating to how New York City provided Title I services to nonpublic school students.

Second, adhering to this Court's admonishment in *Wheeler* v. *Barrera, supra,* 417 U.S. at 426-27, it declined the appellants' invitation to ignore the extensive record developed concerning the New York City program and to decide the case on the basis of hypothetical facts or fears. *E.g.*, J.S., pp. 18a-19a, 36a-37a.

Finding no dispute over the secular purpose of Title I, J.S., pp. 19a-20a, the district court focused its analysis on the primary effect and excessive entanglement branches of the controlling Establishment Clause test. The district court's ruling that Title I does not have a primary effect that either advances or inhibits religion was based on three factors. First, the true beneficiaries of the Title I remedial educational services are educationally and economically deprived students and not the church-affiliated schools they attend. J.S., pp. 20a-26a; *cf. Wheeler* v. *Barrera, supra,* 417 U.S. at 405-06. Second, the church-affiliated schools attended by students receiving Title I services did not have the characteristics of pervasively sectarian schools described in previous decisions of this Court invalidating aid programs. J.S., pp. 29a-32a.[11] Third, the secular educational services provided by Title I teachers were separable and, in fact, totally separated from any religious activities of the church-affiliated schools in which those teachers worked. J.S., pp. 33a-35a. These three factors, and particularly the third, persuaded the district court that Title

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[11] The district court's conclusion that the church-affiliated schools enrolling Title I students in New York City were not pervasively sectarian was based not only on the affidavits of the administrators of the church-affiliated schools, but also on evidence offered by Title I teachers showing that "these public employees do not perceive a 'dominant sectarian mission' and have not been subject to religious pressures or influences in the parochial schools in which they work." J.S., p. 31a.

I, as implemented in New York City for nonpublic school students, did not have an impermissible primary effect. In reaching that conclusion, the district court emphasized that the evidentiary record in this case "is a critical feature distinguishing this case from prior decisions relied upon by the plaintiffs." J.S., p. 36a.

In its entanglement analysis, the district court was confronted by appellants' contention that the decisions in *Meek* v. *Pittenger*, 421 U.S. 349 (1975), and *Public Funds for Public Schools* v. *Marburger*, 358 F. Supp. 29 (D.N.J. 1973), *aff'd*, 417 U.S. 961 (1974), established a per se rule prohibiting publicly funded teachers from providing remedial educational services on the premises of church-affiliated schools during regular school hours. The district court disagreed that *Meek* and *Marburger* established any such per se rule and examined the three elements of the entanglement test — the character and purposes of the schools involved, the nature of the aid program and the resulting administrative relationships — to determine whether New York City's implementation of Title I for nonpublic school students had produced excessive government entanglement with religion. J.S., pp. 39a-40a.

For reasons already noted, the district court found that the church-affiliated schools in this case did not have the pervasively sectarian characteristics this Court attributed to the schools in *Meek*. J.S., pp. 40a-41a. It further concluded that the aid provided nonpublic school students in New York City will not lead to excessive entanglement "because the aid provided under Title I does not result in an 'impermissible fostering of religion,' " and thus "the 'continuing surveillance' deemed necessary in *Meek* is not required to guard against the advancement of religious views or pursuits." J.S., pp. 41a-42a. In reaching that conclusion, the district court contrasted the fears expressed by this

Court, based on an inadequate record, about what *might* happen under the *Meek* program with its express findings, based on an extensive record, that those fears have not materialized in the 14 years the New York City program has operated. *Id.* Finally, the district court ruled that the resulting administrative relationships in the Title I program have not led to excessive entanglement because those relationships give Title I employees no authority over, or involvement in, the educational programs of the nonpublic schools and give the administrators of nonpublic schools no authority over Title I teachers or the content of Title I instruction. J.S., pp. 42a-45a.

Based on these considerations, the district court ruled that the result reached by this Court in *Meek* was not controlling and that the Title I program implemented in New York City for nonpublic school students has not resulted in excessive entanglement between government officials and religious authority. The district court recognized that the *Meek* entanglement ruling was based in part on this Court's fear that the aid programs challenged in *Meek* would offer "opportunities for political fragmentation and division along religious lines" and thus lead to political entanglement. 421 U.S. at 372. The district court ruled that Title I, by its very nature, did not carry a risk of political entanglement and had not in fact generated any "divisive religious fragmentation" since its enactment in 1965. J.S., pp. 45a-47a.

Thus, on the basis of its careful and thorough application of the governing Establishment Clause principles to the extensive evidentiary record developed in this case, the district court ruled unanimously that the Title I program implemented in New York City for nonpublic school students did not contravene the Establishment Clause.

ARGUMENT

The appellants' argument that this case presents a substantial question requiring plenary review by this Court rests on a very basic and simplistic contention — namely, that the decisions in *Meek* v. *Pittenger, supra,* and *Public Funds for Public Schools* v. *Marburger, supra,* established a per se rule prohibiting any use of public funds to pay the salaries of public school employees who provide remedial educational services to nonpublic school students on the premises of their nonpublic schools during regular school hours, irrespective of the circumstances of a particular case. The district court considered and rejected that precise argument, presented to it in virtually the identical language used by the appellants in their Jurisdictional Statement. The district court did so only after analyzing carefully *Meek, Marburger* and related Establishment Clause decisions of this Court and applying the principles of those decisions to the facts of this case. Intervenor-appellees submit that the district court disposed of the appellants' claims in a manner that is in harmony with the controlling decisions of this Court and that no substantial question remains warranting plenary review by this Court.

The appellants' exclusive reliance on the *Meek* and *Marburger* decisions is significant for what it concedes. The remedial educational programs struck down in *Meek* and *Marburger*[12] were invalidated solely on the

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[12] Appellants assert that the auxiliary services program challenged in *Marburger* provided "services identical to those involved in the present case," and that the auxiliary services program challenged in *Meek* was "fashioned after the federal statute at issue here." J.S., p. 6. Intervenor-appellees take issue with the appellants' efforts to equate Title I with the auxiliary services programs invalidated in *Meek* and *Marburger*. The record in this case shows that there are a number of significant differences between Title I and those aux-

ground that they had the potential for fostering excessive government entanglement with religion. In neither case were the challenged aid programs invalidated for having an impermissible legislative purpose[13] or a primary effect that advanced or inhibited religion. Thus, by relying exclusively on the *Meek* and *Marburger* decisions, the appellants concede that Title I is valid in its purpose and primary effect, and they challenge its constitutionality only on the ground that it has led to excessive government entanglement with religion.

The appellants' entanglement argument is factually flawed in two respects. First, that argument is based on appellants' elaborate description of the religious characteristics they attribute to nonpublic schools enrolling students who qualify for Title I services. J.S., pp. 9-11. Indeed, those characteristics go far beyond this Court's description of the "profile" of pervasively sectarian schools described in the *Meek* case. See 421 U.S. at 356. What the appellants fail to acknowledge is that their description of church-affiliated schools is based on the responses of one witness, a government official, to what the district court described as "a series of primarily hypothetical questions." J.S., p. 6a. What the appellants overlook is that the record in this case contains

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liary services programs. For example, Title I services are available only to nonpublic school students who meet the dual statutory eligibility criteria of educational *and* economic disadvantage. There was no requirement in the *Meek* and *Marburger* programs that participating nonpublic school students be economically disadvantaged. The poverty eligibility requirement of Title I has meant, in New York City, that students in fewer than one-fourth of all nonpublic schools receive Title I remedial services. J.S., p. 24a.

[13] Indeed, this Court expressly held in *Meek* that the challenged auxiliary services program had a valid secular legislative purpose. 421 U.S. at 367-68.

not a shred of evidence that any nonpublic school in New York City enrolling Title I students possesses any of the characteristics described in their hypothetical questions. In fact, to the extent that the record describes those nonpublic schools at all, it negates the very characteristics upon which the appellants' entanglement analysis rests. See J.S., pp. 31a-32a.

The district court specifically addressed this aspect of appellants' argument.

> "Counsel [for the plaintiffs] sought to establish that the federal government interpreted and applied Title I to authorize government assistance to students who attended nonpublic schools that fit the pervasively sectarian profile. . . . [T]his line of questioning missed the mark, for the Court cannot rule on the basis of even well-founded hypotheticals in the absence of evidence concerning a concrete program." J.S., p. 30a.

The district court relied for that proposition expressly on this Court's decision in *Tilton* v. *Richardson,* 403 U.S. 672 (1971). The appellants in that case, as do the appellants in this case, sought to shift the Court's attention from the trial court evidence about the schools actually involved in the case to "a 'composite profile' that they have constructed of the 'typical sectarian' institution." 403 U.S. at 682. The plurality expressly rejected that approach.

> "[A]ppellants do not contend that these four institutions fall within this category [of typical sectarian institutions]. Individual projects can be properly evaluated if and when challenges arise with respect to particular recipients and some evidence is then presented to show that the institution does in fact possess these characteristics. We cannot, however, strike down an Act of Congress on the basis of a hypothetical 'profile.' " *Id.*

Mindful of that admonition, the district court declared that it "must evaluate Title I with respect to the New York City program on the basis of the evidence presented in this case." J.S., p. 31a. In conducting such an analysis, the district court expressly found that the pertinent nonpublic schools in New York City "do not have the characteristics of the pervasively sectarian schools described by the Supreme Court." *Id.*

The second factual flaw in appellants' entanglement analysis is their characterization of certain visits made to nonpublic schools in New York City by Title I supervisors as "intrusionary investigatory entrances into the religious schools" which, appellants claim, necessarily have entangling impact. J.S., p. 12. The district court specifically dealt with that contention, labeling it an "unsupported charge." J.S., p. 44a. The district court noted, based on the record, that "Title I supervisors maintain a complete separation between Title I activities and the regular programs of the parochial schools." J.S., pp. 43a-44a. It also found that the Title I supervisor "reviews and evaluates only the performance of the Title I teacher in the Title I classroom; neither the parochial school nor its instructional program is subject to public examination." J.S., p. 44a. Based on those findings, the district court ruled that "[t]he occasional visits made by Title I supervisors and coordinators [to nonpublic schools] do not . . . give rise to excessive entanglement." *Id.*

The flaws in appellants' factual presentation are compounded by their inattention to the closest precedent of this Court. In focusing, as they do, exclusively on the *Meek* and *Marburger* decisions, the appellants ignore the only decision in which this Court was confronted by a challenge to the constitutionality of providing Title I

remedial services to nonpublic school students on the premises of their schools during regular school hours — *Wheeler* v. *Barrera, supra.* Because there was no program before the Court that provided Title I services to nonpublic school students in that form in *Wheeler,* the Court declined to reach the constitutional question.

> "The task of deciding when the Establishment Clause is implicated in the context of parochial school aid has proved to be a delicate one for the Court. Usually it has required a careful evaluation of the facts of the particular case. . . . It would be wholly inappropriate for us to attempt to render an opinion on the First Amendment issue when no specific plan is before us. A federal court does not sit to render a decision on hypothetical facts. . . ." 417 U.S. at 426-27.

Nevertheless, the Court indicated that a Title I program on the premises of parochial schools would not necessarily be constitutionally doomed.

> "[A] program whereby a former parochial school teacher is paid with Title I funds to teach full time in a parochial school would present quite different problems than if a public school teacher, solely under public control, is sent into a parochial school to teach special remedial courses a few hours a week." 417 U.S. at 426.

Wheeler, in short, rejects the notion that any per se rule of invalidity would be applied to a constitutional challenge to Title I and requires that a "specific plan" be examined to resolve such a challenge.

The district court in this case was presented with an extensive and uncontroverted record about a "specific plan" — New York City's program of providing Title I services to nonpublic school students. Under that program, itinerant public school employees, solely under

public supervision and control, are sent into church-affiliated schools to teach special remedial courses for a few hours a week. The district court evaluated New York City's 14-year experience with that specific program in light of this Court's many Establishment Clause decisions on the issue of aid to parochial schools. Its careful and thorough analysis convinced it that New York City's Title I program had not led to excessive government entanglement with religion and had not encroached on any of the values the Establishment Clause was intended to preserve.

In so ruling, the district court neither disregarded nor disturbed this Court's decision in *Meek*.[14] Indeed, the district court specifically found that "*Meek* is . . . distinguishable from the case at bar." J.S., p. 47a. Two principal factors led the district court to that conclusion.

First, it noted that the *Meek* decision was based in part on this Court's determination that the challenged auxiliary services were provided in schools with a "dominant sectarian mission . . . in which an atmosphere dedicated to the advancement of religion is constantly maintained." J.S., p. 40a. The district court specifically found that church-affiliated schools involved in this case did not share the sectarian characteristics attributed to the schools in *Meek*. J.S., pp. 31a-32a. The district court noted that "the typical nonpublic school where Title I services are provided in New York does not fit the Supreme Court's profile of a pervasively sectarian institution. Nor do the Title I personnel assigned to nonpublic schools perceive a dominant sectarian mis-

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[14] While acknowledging the result in *Marburger*, the district court focused its analysis on this Court's reasoning in the *Meek* decision. J.S., p. 37a n.11.

sion or atmosphere in the schools in which they teach." J.S., p. 40a.

Secondly, the district court noted that the auxiliary services program in *Meek* was challenged shortly after its enactment and "evidence about its operation was scarce." J.S., p. 36a. For example, the district court noted that "the record [in *Meek*] provided little or no information on how the publicly employed teachers performed their services or were supervised." J.S., p. 41a. As a result, the district court in *Meek* was forced to rely on the good faith and professionalism of the auxiliary services teachers, a reliance that this Court ruled was misplaced. 421 U.S. 369. Moreover, because there had been very little experience with the auxiliary services program in *Meek* and evidence concerning its operation was sparse, this Court's excessive entanglement ruling was based not on the conclusion that the program had in fact led to impermissible entanglement, but rather on the fear that the program had "[t]he *potential* for impermissible fostering of religion." 421 U.S. at 372 (emphasis added).[15]

The district court in this case did not face the problems created by a newly enacted program and a sparse or inadequate record. The district court noted that "New York City has been providing Title I services in nonpublic schools for fourteen years," and that the uncontroverted evidence presented about that program il-

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[15] This Court's concern for what *might* happen under the *Meek* program was underscored by its further assertion that the program "has the *potential* for provoking controversy between the Commonwealth and religious authorities." 421 U.S. at 372 n.22 (emphasis added).

luminated all aspects of its operation. J.S., p. 36a. For that reason, the district court was able to state:

> "The evidence establishes that the result feared in other cases has not materialized in [New York] City's Title I program. The presumption — that the 'religious mission' will be advanced by providing educational services on parochial school premises — is not supported by the facts of this case." J.S., p. 36a.

Because it had the benefit of an extensive and uncontroverted evidentiary record about a long-established program, the district court did not have to speculate about the potential consequences of the program, as had been true in *Meek*. Rather, the district court was able to conclude that "the affirmative evidence before this Court establishes that Title I personnel *have not* fostered religious views or advanced religious activities." J.S., p. 41a (emphasis in original).

Thus, the district court took full account of the fears of potential entanglement expressed by this Court in *Meek*, searched the uncontroverted record to determine if those fears had materialized in this case and found they had not. As a result, the decision of the district court is wholly consistent with this Court's decision in *Meek*.

Intervenor-appellees submit that this Court can reach a contrary result in this case only if it is willing to disregard the uncontroverted evidentiary record developed below and accept the hypothetical facts and imaginary fears presented by the Jurisdictional Statement. However, this Court has specifically rejected that approach to assessing the constitutionality of Title I. *Wheeler* v. *Barrera, supra*, 417 U.S. at 426-27; see also *Tilton* v. *Richardson, supra*, 403 U.S. at 682. As a consequence, this appeal presents no substantial question warranting plenary review by this Court.

CONCLUSION

For the foregoing reasons, the district court's disposition of the appellants' Establishment Clause claim is in harmony with the controlling precedents of this Court, and no substantial question remains to justify plenary review by this Court. The judgment of the district court should be affirmed.

Respectfully submitted,

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